Nos. 06-969 & 06-970

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
Appellant,

v.

WISCONSIN RIGHT TO LIFE, INC.,
Appellee.

SENATOR JOHN MCCAIN, *et al.*,
Appellants,

v.

WISCONSIN RIGHT TO LIFE, INC.,
Appellee.

On Appeals from the United States District Court for the District of Columbia

BRIEF *AMICUS CURIAE* ON BEHALF OF THE ALLIANCE FOR JUSTICE

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INTEREST OF *AMICUS* [1]

The Alliance for Justice ("AFJ") is a national association of environmental, civil rights, mental health, women's, children's and consumer advocacy organizations. These organizations and their members support legislative and regulatory measures that promote political participation, judicial independence and greater access to the public policymaking process. Most of AFJ's members are charitable organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code. A significant number, also work with or are affiliated with other types of nonprofit entities that promote their views not only through public education and legislative advocacy, but also in the electoral process.

AFJ works to increase the involvement of advocacy organizations in the policymaking process by helping them to understand and comply with the complex tax and election laws governing their activities through plain language guides, workshops and individualized technical assistance. AFJ also monitors legislative and regulatory activity impacting the ability of advocacy organization to operate in the policy arena. During debate on the Bipartisan Campaign Reform Act of 2002 ("BCRA"), we expressed deep concern that the law's broad provisions limiting "electioneering communications" would severely curtail legitimate communications addressing legislative and other policy issues. AFJ also appeared as *Amicus Curiae* when this case was previously before this Court.

On matters of public policy, AFJ consistently takes positions that sharply contrast with the positions of appellee in this case. Indeed, we have produced and disseminated broad-

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[1] Counsel for each party has consented to the filing of this Brief, as indicated by letters filed with the Clerk of the Court. No counsel for a party authored this Brief, in whole or in part. No person or entity other than *Amicus* made a monetary contribution to the preparation or submission of this Brief.

cast communications supporting the important role of the Senate in considering the President's nominees to the federal bench, including the limited use of filibusters in appropriate cases. Despite these profound policy differences, AFJ agrees with appellee that citizen organizations have a First Amendment right to advocate their views before the public without government interference, and we submit this Brief in order to urge the Court to make that right a reality in the critical area of grassroots advocacy.

STATEMENT

The Legal Framework of Advocacy Groups

Advocacy organizations such as *Amicus* and its members provide a critical means by which the voices of ordinary citizens across the political spectrum may be heard on vital policy and legislative issues. BCRA's restrictions on corporate and union expenditures for electioneering communications will severely limit this crucial role of advocacy organizations in our democracy unless this Court approves a constitutionally mandated exception for grassroots lobbying communications similar to the exception adopted by the district court.

1. **Permissible Lobbying Activities of Advocacy Organizations.** Advocacy organizations are generally organized as nonprofit corporations under state law and are recognized as exempt from federal taxation either as social welfare organizations under section 501(c)(4) of the Internal Revenue Code ("IRC") or charitable and educational organizations under IRC § 501(c)(3). Internal Revenue rules permit social welfare organizations to expend all of their resources on advocating for policy and legislative changes without limitation. *See* Rev. Rul. 71-350, 1971-2 C.B. 237. Advocacy organizations exempt as charities may spend unlimited amounts on public education involving policy issues but may only expend an insubstantial part of their resources on efforts to influence legislation. *See* IRC § 501(c)(3). In the Tax

Reform Act of 1976, Congress enacted IRC §§ 501(h) and 4911, under which charities, other than churches and private foundations, may alternatively elect to be subject to a set of dollar limitations on expenditures for lobbying activities. Pub. L. 94-455, 90 Stat. 1520, § 1307 (1976). The purpose of this legislation was to encourage charities to participate in the policymaking process by replacing the uncertain standards of prior law and eliminating the threat that charities which conduct excessive lobbying would lose their exemptions from federal tax. *See, e.g.*, Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1976*, 1976-3 C.B. (Vol. 2) 419-420.

As approved in this Court's decision in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983) (*TWR*), many groups maintain both 501(c)(4) and 501(c)(3) organizations under a common umbrella, frequently sharing staff and other resources.[2] The 501(c)(4) entities in these multi-entity arrangements may maintain separate segregated funds to raise voluntary contributions to support partisan political activities without jeopardizing the tax exemptions of the related 501(c)(4) or 501(c)(3) organizations. *See generally*, Ward L. Thomas and Judith E. Kindell, "Affiliations Among Political, Lobbying and Educational Organizations," *in* IRS Exempt Organizations Division, Continuing Professional Education Technical Instruction Program for FY 2000, 255-266. These segregated funds may be registered as political action committees (PACs) under the Federal Election Campaign Act ("FECA") or state election laws; in some instances they are instead required to register and file periodic reports with the Internal Revenue Service. *See* IRC §§ 527(i) and (j). The activities of these separate segregated political action committees are not attributed to the fund's parent

[2] As the Court noted in *TWR*, the IRS requires "only that the two groups be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying." 461 U.S. at 544 n.6.

nonprofit corporation for federal tax purposes. *See* IRC § 527(f)(3).

2. **The *MCFL* Exception and Its Narrow Implementation By The FEC.** In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), this Court recognized a constitutionally required exception to FECA's ban on corporate political expenditures for certain nonprofit corporations that "have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status." In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court read this exception into BCRA § 203's ban on corporate electioneering communications. 540 U.S. at 211. Unfortunately, this judicially crafted exception is of limited use in protecting legislative and policy advocacy by advocacy organizations in large part because of the very restrictive conditions imposed by the Federal Election Commission ("FEC") on its implementation.[3] The FEC regulation defines the term "qualified nonprofit corporation" as *inter alia* an organization whose "only express purpose is the promotion of political ideas," 11 C.F.R. § 114.10(c)(1) (2006), and which is organized for tax purposes only under IRC § 501(c)(4).[4] *Id.* at § 114.10(c)(5). The regulation also

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[3] IRC § 501(c)(4) organizations that conduct electioneering communications under the *MCFL/McConnell* exception also risk the imposition of federal taxes on these expenditures under IRC § 527(f). While the IRS has made clear that not all communications that fall within the scope of BCRA § 203 will be taxable, *see* Rev. Proc. 2004-06, 2004-6 I.R.B. 328, the vague "facts and circumstances" test which the IRS applies to make this determination leaves significant uncertainty as to its application to particular communications.

[4] The FEC initially promulgated a blanket exception to the definition of electioneering communications for communications by any IRC § 501(c)(3) organization. *See* Final Rules, "Electioneering Communications," 67 Fed. Reg. 65190, 65211, adopting 11 C.F.R. § 100.29(c)(6); *id.* at 65200. This exception, however, was invalidated on procedural grounds. *See Shays v. FEC*, 337 F.Supp.2d 28, 124-127 (D.D.C. 2004),

requires that a qualified nonprofit corporation be able to demonstrate from its accounting records that it does not directly or indirectly accept any donations or anything of value from business corporations or labor organizations, *id.* at § 114.10(c)(4)(ii), or have a written policy against accepting donations from business corporations or labor organizations. *Id.* at § 114.10(c)(4)(iii). Finally, a qualified nonprofit corporation may not engage in any business activities, *id.* at § 114.10(c)(2), and may not provide benefits to its members such as affinity credit cards, insurance policies or savings plans, training, education, or business information. *Id.* at § 114.10(c)(3)(ii)(A)-(B). The total ban on the receipt of any financial assistance from business corporations or labor organizations and the restriction on the kinds of benefits provided by many nonprofit organizations to their members has meant that only a handful of advocacy organizations may qualify under the FEC's regulation.

3. **BCRA's Treatment of Nonprofit Organizations.** Section 203(c)(2) of BCRA creates an exception to the ban on corporate electioneering communications for any broadcast communication by an IRC § 501(c)(4) organization if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals lawfully admitted for permanent residence. FECA § 316(c)(2). This exception, however, was nullified by BCRA § 204, the Wellstone Amendment. *See McConnell v. FEC*, 540 U.S. at 209 n. 90. BCRA, therefore, prohibits electioneering communications by all advocacy organizations unless they fall within the judicially-crafted exception for

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aff'd as to other issues, 414 F.3d 76 (D.C. Cir. 2005), and after initiating another rulemaking the FEC decided to eliminate the exception from the regulation. *See* Final Rules, "Electioneering Communications," 70 Fed. Reg. 75713, 75714 (Dec. 21, 2005). Thus, 501(c)(3) organizations remain subject to BCRA § 203 on the same terms as for-profit businesses and other nonprofit organizations, and without even the limited benefit of the *MCFL* exception.

MCFL/McConnell-type organizations as narrowly implemented by the FEC.

4. **The FEC's Failure to Act to Protect Grassroots Lobbying.** In *Wisconsin Right To Life v. FEC*, 546 U.S. 410, 126 S.Ct. 1016 (2006) ("*WRTL I*"), the Court specifically noted that "the FEC has statutory authority to exempt by regulation certain communications from BCRA's prohibition on electioneering communications." 126 S.Ct. at 1017 (citing 2 U.S.C. § 434(f)(3)(B)(iv)). Following the Court's decision, *Amicus* joined with other advocacy, labor and business organizations in submitting a petition for rulemaking requesting the FEC to promulgate an exception to the regulatory definition of electioneering communications for certain grassroots lobbying communications. The Commission refused to act on this petition, however, leaving the development of rules in this area to individual enforcement cases as they arise. *See* Notice of Disposition of Petition for Rulemaking, "Exception for Certain 'Grassroots Lobbying' Communications From the Definition of 'Electioneering Communication,'" 71 Fed. Reg. 52295 (Sept. 5, 2006) ("Notice of Disposition. . ."). Thus, although the issues presented in this case arise in the context of an affirmative pre-enforcement judicial challenge, the principles announced by the Court could have their most important application, not in judicial proceedings, which are too costly for many nonprofit organizations to undertake, but in administrative enforcement proceedings brought after broadcast communications have been disseminated.

SUMMARY OF ARGUMENT

The FEC and Intervenors do not question this Court's holding in *WRTL I* that as-applied challenges to the constitutionality of BCRA § 203 are permissible. The FEC also recognizes that as-applied challenges should not require examination of all facts that are potentially relevant to the ascertainment of a broadcast advertisements purpose or

effect, since such an inquiry could not feasibly be administered under the time constraints of pre-election litigation. The approach offered by the FEC and Intervenors, however, would have the effect of nullifying the right to bring as-applied challenges recognized in *WRTL I* and would require the same kind of "unstructured post hoc inquiry" which the FEC claims to eschew.

1. Contrary to the FEC's argument, the district court did not adopt a rigid set of requirements for pre-election advertisements that would in all cases lead to a finding of unconstitutionality. The court instead identified those undisputed facts in the record of this case which, taken as a whole, persuaded it that the grassroots lobbying ads disseminated by WRTL did not have an electioneering purpose or effect.

While the FEC offers no test of its own as a substitute for the district court's approach, Intervenors offer a test under which the only significant element would be whether a broadcast communication takes a "critical stance" as to an issue. Intervenors' proposed test fails to clarify a number of important issues. They also do not explain how their "critical stance" rubric differs from the "promote, attack, support or oppose" ("PASO") formula which the district court considered as one of the elements in its review of the WRTL ads. Finally, if Intervenors' proposal allows a lower threshold of proof than the PASO test, it runs counter to Congress' own determination when it enacted a back-up definition of electioneering communications to be applied in the event that BCRA's primary definition was struck down as facially invalid; and, contrary to Intervenors' argument, the district court's approach is not inconsistent with this Court's decision in *McConnell*.

2. The district court also did not improperly place the burden of proof on the FEC. This Court's First Amendment jurisprudence makes clear that the burden of proving that speech restrictions serve compelling governmental interests

"rests on the censor." While the Court has suggested in certain campaign-finance cases that the person claiming an exemption from FECA's prohibitions has the burden of *production* as to facts which are in the claimant's exclusive possession, it has never shifted the ultimate burden of *persuasion* away from the government. It is also erroneous to contend, as the FEC does, that the Court's decision upholding the facial constitutionality of BCRA § 203 creates a presumption that all broadcast ads run during BCRA's 30/60 day periods are constitutional.

3. The district court correctly considered as relevant to its constitutional determination the fact that WRTL's ads did not mention an election, a candidate or a political party, and did not comment on a candidate's character, actions or fitness for office. These aspects of the ads were clearly relevant to whether the ads had an electioneering purpose. If relying on the fact that broadcast ads focus on issues rather than elections or candidates is improper, as the FEC contends, then virtually no grassroots lobbying communications would be constitutionally protected.

4. The district court also did not err in refusing to consider the attenuated contextual evidence proffered by the FEC and the Intervenors. The fact that the WRTL ads did not provide an address or other means by which Wisconsin citizens could contact their two Senators with respect to the filibuster issue hardly shows that the ads had an electioneering purpose, given the ready availability of such contact information to any member of the public. The district court's refusal to consider the partisan content of WRTL's website referenced in the ads also was not erroneous considering the FEC's own recent determination that because of the Internet's unique features it "warrants a restrained regulatory approach," and because of the many practical problems that such consideration would face. A particular problem is presented by the fact that many advocacy organizations include content on their websites that is paid for and identified as having

come from their connected political action committees (PACs) which would undercut Congress' determination in FECA and in the Tax Code that such funds should be treated as separate entities and that their activities therefore should not be attributed to the parent entity.

The district court also did not err in rejecting the "timing" evidence relied on by the FEC and Intervenors. The fact that ads were run within the 60-day period prior to the 2004 general election cannot be determinative, since this would nullify the as-applied challenge for all broadcast communications that fall within BCRA's definition of electioneering communications. The specific timing of the ads is also not dispositive because it may equally reflect the legislative calendar as the electoral calendar, and the fact that Congress was not in session when the WRTL ads were run could be equally explained by the fact that members of Congress are more likely to be reachable in their home states when the Senate is not in session. The point here is not that the timing evidence relied on by the FEC and Intervenors has no possible relevance in determining the purpose of ads, but that the import of such evidence is highly disputable, thereby leading to the very kinds of protracted factual inquiries which the FEC agrees are not appropriate in this area of constitutional law.

Finally, the district court did not err in refusing to find that the evidence of WRTL's other lobbying and political activities demonstrated an electioneering purpose for its broadcast advertisements. Opening as-applied challenges to a full-scale inquiry into an organizations lobbying and political activities will defeat the goal of limiting such inquiries in the First Amendment context, and such sweeping investigations will have a deterrent effect on the associational and speech rights of advocacy organizations, as this Court has recognized. Attributing the partisan purposes of the WRTL PAC to WRTL's separate IRC § 501(c)(4) entity would undercut the carefully balanced statutory scheme for corporate political activity designed by Congress, and is inconsistent with this

Court's reliance on the availability of PACs to conduct electioneering communications in *McConnell.*

5. Finally, the Court should reject the Intervenors' contention that the availability of the PAC and *MCFL* options should have been considered by the district court. The availability of the *MCFL* option has been severely curtailed by restrictive FEC regulations which deny the exemption to all IRC § 501(c)(3) organizations, deny IRC § 501(c)(4) organizations the opportunity of accepting even a *de minimis* amount, or a small percentage, of their support from businesses or labor unions, and prohibit nonprofits from engaging in certain ancillary business activities such as credit cards, insurance or training which are frequently an important source of their revenue. Groups which attempt to conduct grassroots lobbying through the so-called PAC option also risk the imposition of significant taxes by the Internal Revenue Service. And court's cannot make determinations as to whether the *MCFL* or PAC options are viable for a particular organization without undertaking difficult factual determinations which are not within the competence of federal judges to make. The Court's reliance on the PAC option in upholding BCRA § 203 against a facial challenge on grounds of overbreadth also does not support reliance on the PAC or *MCFL* options in determining an as-applied challenge. The purpose and effect of specific grassroots lobbying communications remains the same whether they are paid for by a PAC or *MCFL* organization or by the general treasury funds of an IRC § 501(c)(4) organization.

ARGUMENT

The district court correctly understood this Court's remand order in *WRTL I* as a "tacit acknowledgment that, notwithstanding the virtues of a bright line test, there may nonetheless be some ads that are unconstitutionally captured by BCRA section 203." J.S. App. 28a. The FEC does not

question this conclusion.[5] *See* Brief of Appellant Federal Election Commission in Nos. 06-969 and 06-970, 49 (hereinafter "FEC Brief. . . ."). The agency further acknowledges that the constitutional test for as-applied challenges should not "require[] examination of *all* facts that are potentially relevant to the ascertainment of an advertisement's purpose or effect," since such an inquiry "could not feasibly be administered, especially under the time constraints of expedited pre-election litigation." FEC Brief at 27. Similarly, the agency concedes that "potential speakers may indeed be chilled if the legality of particular communications or financing arrangements turns on an unstructured post hoc inquiry into the speaker's likely intent." FEC Brief at 42. While we endorse these sentiments wholeheartedly from the standpoint of the regulated advocacy community, we disagree with the approach which the FEC and Intervenors urge this Court to adopt in its place.

I. The District Court Properly Avoided Adopting An Absolute Test To Define All Broadcast Communications Protected By The First Amendment. In Contrast, Intervenors' Proposed Constitutional Test Would Nullify The Protection Afforded By The Constitution To Legitimate Legislative and Policy Advocacy.

A careful reading of the majority opinion makes clear that the district court did not "identif[y] only those advertisements that are *most obviously* election-related, and effectively [hold] BCRA § 203 unconstitutional as applied to all other 'electioneering communications.'" FEC Brief at 28. In a case of first impression, it would not have been appropriate for the district court to announce a hard and fast test applicable to all

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[5] Appellant-Intervenors also do not expressly question this conclusion, although, the narrow view they take of the First Amendment's application to such cases would effectively eviscerate the Court's earlier decision in this case.

as-applied challenges to BCRA § 203 or to define a category of ads which would always be protected. The court instead identified those specific facts which, taken as a whole, persuaded it on the record presented that the WRTL grassroots lobbying ads did not have the required electioneering purpose or effect. J.S. App. 22a-25a. Whether other facts, or a different combination of facts, should produce the same constitutional result was not and could not be decided in this initial effort following *WRTL I*.[6]

While the FEC takes issue with the district court's approach, the FEC offers no as-applied constitutional test of its own. Intervenors, on the other hand, put forward a test which would effectively nullify the Court's decision in *WRTL I* by limiting the availability of as-applied challenges to rare cases of no significance to legislative and other policy advocacy.[7] According to Intervenors, in considering WRTL's as-applied challenge, the Court "need look no further" then the fact that the judicial filibuster advertisements (i) were run immediately before the election, (ii) "took a critical stand regarding a position on an issue," and (iii) referred to a candidate by name. *See* Intervenors' Brief at 22-24. Since the first and third of these elements would apply to every broadcast communication that fits within BCRA's definition of electioneer-

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[6] The FEC and Intervenors are wrong, therefore, in suggesting that under the district court's approach any advertisement which merely includes a reference to a pending legislative matter would be exempt from regulation regardless of the other factors considered by the district court. *See* FEC Brief at 26; Brief of Appellant in No. 06-970 ("Intervenors' Brief ...."), 32 n.22.

[7] Intervenors give several examples of the kinds of broadcast communications that "might" be protected by the First Amendment because they are "truly different in kind from the type of advertising that prompted Congress to enact BCRA's restriction and that Congress has a compelling interest in regulating." Intervenors' Brief at 40 n.27. While Intervenors deserve some credit for their imagination, their examples, all of which relate to commercial and other similar activities, demonstrate what little impact the First Amendment would have under their test.

ing communications,[8] the only real substance to Intervenors' proposed constitutional test is the "critical stance" element. There are a number of difficulties with this position.

First, it is unclear whether Intervenors would apply their test to advertisements which take a "critical stance" on a candidate's position regarding any legislative or policy issue, or just to those issues that are an issue of contention in the campaign. *Compare* Intervenors' Brief at 10, 14, *with id.* at 23. If the "critical stance" test is limited to issues in the campaign, then district courts will have the near impossible task of reviewing candidates' speeches, advertisements and position papers, the activities of political parties and independent political groups, and media coverage of the campaign to determine which policies have become significant in the campaign. On the other hand, if the "critical stance" element of Intervenors' proposed test refers to *any* matter of public policy on which a candidate has taken or might take a position, the likelihood is much less that the advertisements in issue would have an impact in the election, and the test would have a far greater impact in limiting legitimate legislative and policy advocacy.

Second, although Intervenors appear to believe that there is a recognizable difference between communications which are merely "critical" of a candidate and those which "promote, support, attack or oppose" (PASO) a candidate, as articulated by the district court, *see* Intervenors' Brief at 35, they make no attempt to explain this difference in any way which would be helpful to the lower courts, the FEC, or the regulated community. Intervenors' "critical stance" test would intro-

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[8] This would not be true as to the first element if Intervenors mean the word "immediately" to apply only to broadcast communications made late in the 30/60 day BCRA periods, rather than to communications made throughout those periods. There is no such suggestion in their brief, however, and they also fail to make clear how courts should decide whether advertising is close enough to an election to be regulated.

duce a new level of vagueness[9] which can only serve to deter advocacy organizations from engaging in legitimate legislative and policy advocacy in the periods preceding elections. Further, in adopting the PASO language as a backup definition of electioneering communications in case BCRA's primary definition was found to be facially unconstitutional, *see* FECA § 304(f)(3)(A)(ii), Congress defined the level of critical comment which it believed should be used to protect against the sham issue ads with which it was concerned. To the extent that Intervenors suggest that issue ads may be regulated if they reach a lower threshold of criticism than is required under the PASO test, their argument runs counter to this Congressional determination.

Third, the district court's approach is not inconsistent with this Court's decision in *McConnell*. *See* Intervenors' Brief at 32-34. The "magic words" test relied on the absence of a very limited number of specific words to define protected speech. *See, e.g., McConnell*, 540 U.S. at 191. In contrast, the district court in this case considered the entire content of the WRTL ads. While the court did rely on the absence of words attacking Senator Feingold's character, qualifications

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[9] Because the district court found that WRTL's ads did not violate the PASO standard, the Court need not determine in this case whether a more clear standard than PASO would better serve the First Amendment interests at stake in as-applied cases. The petition for rulemaking submitted to the FEC by *Amicus* and other groups urged the agency to adopt a standard, which, while very similar in other respects to the approach followed by the district court, replaced the PASO standard with a requirement that "[i]f the communication discusses the candidate's position on record on the matter, it does so only by quoting the candidate's own public statements or reciting the candidate's official action, such as a vote, on the matter.") Notice of Disposition, 71 Fed. Reg. at 52295. For the same reason, this is not an appropriate case for the Court to decide whether the PASO standard is unconstitutionally vague as applied to advocacy organizations' pre-election broadcast communications. *Cf. McConnell*, 540 U.S. at 170 n. 64 (holding that the PASO standard is not unconstitutionally vague as applied to political party committees).

or fitness for office, it did not, as Intervenors suggest, *require* the presence of such words as a precondition for regulation, as its reliance on the PASO test and other elements shows.

Finally, there is no basis for Intervenors' unsubstantiated contention that the district court's approach will "invite wholesale circumvention of the campaign-finance laws." Intervenors' Brief at 36. The district court required a reference to a pending legislative matter as a first step in identifying "genuine" issue ads because an advertisement which does not include such a reference is highly unlikely to have a nonelectioneering purpose. The court did not stop there, however. Thus, an advertisement which attacks a candidate for her prior votes or public statements on a legislative issue still may violate the PASO element of the district court's approach.[10]

II. The Burden of Proof In This Case, As In All First Amendment Cases, Was on the FEC.

The district court also did not, as the FEC argues,[11] improperly "place[ ] upon the government the burden of establishing that the three advertisements implicate the concerns that BCRA § 203 is intended to address, rather than requiring appellee to demonstrate its constitutional entitlement to an exemption from a facially valid law." FEC Brief at 28. This argument is contrary to numerous previous pronouncements of this Court regarding the burden of proof in First Amendment cases.

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[10] There is no merit to Intervenors' argument that the reference in the WRTL ads to the actions of a "group of Senators" was a clear critical reference to Senator Feingold's prior position regarding judicial filibusters. *See* Intervenors' Brief at 38. This was a question of fact to be decided by the district court, whose determination was well within its discretion given that the burden of persuasion was on the FEC in this case. *See infra* pp. 15-18.

[11] Intervenors also appear to place the burden of persuasion on plaintiffs in as-applied cases. *See* Intervenors' Brief at 39.

In *Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965), for example, the Court held unconstitutional a state statute requiring registration as a member of a Communist-front organization where the organization had been officially cited or identified as such by the Attorney General of the United States or other federal agencies. The Court held that the state statute unconstitutionally provided that the federal designations were "presumptive evidence" that the organization was a covered organization under the state provision, thus "cast[ing] an impermissible burden upon the appellants to show that the organizations are not Communist fronts." 380 U.S. at 496. The Court in *Dombrowski* relied on its earlier decision in *Speiser v. Randall*, 357 U.S. 513, 526 (1958), where it had held unconstitutional a state's imposition on a taxpayer of the burden of persuasion as to his eligibility for a tax exemption; taxpayers who signed an oath disclaiming advocacy of the unlawful overthrow of the government were deemed eligible for the exemption, while taxpayers who refused to sign such an oath were required to demonstrate their eligibility. As later quoted in *Dombrowski*, the Court stated: "Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech." *See Consolidated Edison Company v. Public Service* Com'n, 447 U.S. 530, 540 (1980) ("Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest."; *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) ("Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, . . . 'the burden is on the Government to show the existence of [a compelling] interest.'") (quoting *Elrod v. Burns*, 427 U.S. 347, 362 (1976); additional internal citations omitted); *Healy v. James*, 408 U.S. 169, 184 (1972) ("heavy burden rests on

the [state] to demonstrate the appropriateness of its action."; *Freedman v. State of Maryland*, 380 U.S. 51, 58 (1965) ("the burden of proving that the film is unprotected expression must rest on the censor.")

The as-applied campaign finance decisions relied on by the government do not establish a different rule. These cases at most suggest that in some circumstances a party claiming the benefit of a constitutional exemption from FECA's requirements has the burden of *production* with respect to facts that are within its exclusive knowledge or possession; the Court did not address the very different question of the ultimate burden of *persuasion*.[12] *Cf. Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). "When the evi-

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[12] In *Buckley v. Valeo*, the Court refused to grant a blanket constitutional exemption from FECA's reporting requirements for all minor political parties, holding instead that a minor party is entitled to an exemption only where there is "a substantial threat of harassment." 424 U.S. at 72-74. While the Court suggested that the minor party had the burden of production on this issue, it recognized, "that unduly strict requirements of proof could impose a heavy burden," *id.* at 74, and that "[m]inor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim." *Id.* The Court later affirmed these sentiments when it considered an as-applied challenge to analogous state reporting requirements filed by a minor party. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 93-94 (1982). Rejecting an "unduly narrow view of the minor-party exemption" urged by the state, 459 U.S. at 94-98, the Court considered the evidence of harassment offered by the minor party and concluded that it met the test. *Id.* at 98-101. At the very most, the Court's opinion placed the burden of *production* on the minor party seeking exemption, an unexceptional conclusion considering that it is the party who had access to evidence of harassment. The Court's opinion did not, however, discuss which party had the burden of persuasion in the event that the evidence was disputed.

The Court's opinion in *MCFL* also does not support the FEC's position here. While it stands to reason that an advocacy organization claiming exemption from FECA would have the burden of production with respect to the corporate characteristics outlined by the Court, the Court never placed the burden of *persuasion* on the organization claiming the exemption. *See* 479 U.S. at 263-264.

dence is ambiguous," however, "[i]n the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S.767, 776, 777 (1986).

In accordance with the Court's overbreadth jurisprudence, the only issue decided in *McConnell* was whether the plaintiffs had "carried their heavy burden of proving" that the statute covered a "substantial" amount of protected speech. *See* 540 U.S. at 207. The *McConnell* plaintiffs' failure in demonstrating a sufficient *quantity* of improperly covered communications is irrelevant in considering whether regulation of a specific communication is justified by the appropriate governmental interests.

Finally, the fact that the constitutional validity of WRTL's filibuster advertisements arises in a pre-election affirmative challenge also should not shift the burden of proof to the organization seeking to protect its right to speak. If an as-applied constitutional issue arises in a civil enforcement action brought by the FEC, the burden would be on the agency to demonstrate not only that the advertisements fall within the statutory prohibition on electioneering communications, but also that the ads are constitutionally subject to regulation. *See, e.g., Colorado Republican Campaign Comm. v. FEC*, 518 U.S. 604 (1996). Similarly, if the issue arises in a criminal case, the burden would surely be on the government to show that the ads are of a kind that may be regulated without violating the First Amendment.

III. The Elements of WRTL's Advertisements Relied On By The District Court Helped To Demonstrate That The Advertisements Did Not Have An Electioneering Purpose or Effect.

The FEC contends that the factual elements on which the district court relied are overly broad and would, if applied

in all cases, effectively evicerate BCRA § 203 itself. For example, the FEC objects to the district court's reliance on the fact that "'the language in [WRTL's] advertisements does not mention an election, a candidate, or a political party, nor do they comment on a candidate's character, actions, or fitness for office.'" FEC Brief at 29, quoting J.S.App. 23a. Since references to an election or a federal official's status as a candidate confirm that an advertisement covered by BCRA § 203 has an electioneering purpose, the absence of such references is some evidence that the ads do not have such a purpose. Similarly, since comments on a candidate's character, actions, or fitness for office is at least suggestive of an electioneering, rather than an issue-related, purpose, the absence of such language may equally be indicative of a nonelectioneering, issue-directed purpose. If these elements of the WRTL ads are irrelevant, however, no as-applied challenge to BCRA § 203 could ever succeed, for it is the essence of genuine grassroots lobbying ads that they focus on legislative and policy issues rather than the election.

IV. The District Court Did Not Err In Refusing To Consider The Attenuated Contextual Evidence Proffered By The FEC and Intervenors.

The FEC also argues that the district court erred in refusing "to consider highly probative evidence outside the 'four corners' of the 2004 advertisements." FEC Brief at 38. Intervenors take the same position. Intervenors' Brief at 24-28. The district court, however, did not err when it failed to give weight to the "contextual" evidence relied on by the FEC and Intervenors.[13]

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[13] The extent to which the FEC's and Intervenors' position would open up expansive factual inquiries in as-applied cases is demonstrated by the wide range of contextual evidence that could be relevant in as-applied cases. In the lower court, for example, the FEC proposed 17 separate findings of fact covering three full pages under the heading "The 2004 Wisconsin Senate Election Was Expected to Be Competitive, and Judicial Filibusters Were a Campaign Issue." Joint Appendix (J.A.), 17-20. Allow-

A. The FEC and Intervenors make much of the fact that, while the WRTL ads asked viewers and listeners to contact Senators Kohl and Feingold and urge them to oppose the filibuster of judicial nominees, the ads did not provide an email address or other contact information for either official. Given the ready access of such information on the Internet and through many other means, the absence of such information, does not in any way demonstrate that WRTL's interest in the judicial filibuster issue was a pretext for an electioneering message. There is also no merit in the FEC's argument that the district court should have considered the content of the organization's website as probative evidence regarding the purpose of the ads. FEC Brief at 43-44, 45. Consideration of the content of a website, even one that is expressly referenced in an advertisement, runs the risk of interfering with, as the FEC itself has recognized, "a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach." Final Rules, "Internet Communications," 71 Fed. Reg. 18589 (Apr. 12, 2006).

The FEC's argument also would present substantial practical difficulties. Many advocacy organizations' websites include hundreds, if not thousands, of pages and include links to numerous other organizations' sites. Moreover, an organization's website frequently changes on a daily or even hourly

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ing courts to delve into the strength of a candidate's opposition in a particular election or what issues have become of significance in a campaign, however, is a highly uncertain inquiry which poses serious issues of judicial administration and could deter organizations from undertaking legitimate issue advertising in uncertain cases. Similarly, it easily could be disputed whether broadcast advertisements run before national political party conventions have the purpose or effect of influencing delegates' votes, which are predetermined by the primary process. While it might be argued that such pre-convention ads are instead directed at the up-coming general election, this too would require an expansive factual inquiry to resolve.

basis, and in the case of blogs there may be numerous contributors to the content of a website. Consideration of the content of an advocacy organization's website would thus open up precisely the kind of "unstructured post hoc inquiry into the speaker's likely intent" that the FEC itself recognizes is not appropriate where constitutional rights of expression and association are involved. *See* FEC Brief at 42.

Many advocacy organizations include on a single website material that reflects the activities of all of its related entities, including, for example, the endorsements of their related PACs. The PAC communications must be identified as such, *see* 11 C.F.R. § 110.11(a)(1); and the PAC must pay all of the costs associated with its portion of the website. A court seeking to determine the purpose of a broadcast communication by looking to the sponsor's website would, therefore, have to engage in the virtually impossible task of determining whether, in spite of these conditions, a PAC's messages were sufficiently separate from the rest of the site. Moreover, as discussed *infra*, pp. 25-26, Congress determined that related PACs are to be treated as separate from their sponsoring organizations and their activities should not be attributed to the sponsoring organizations for legal purposes. Thus, the FEC's argument would upset the carefully-balanced structure of corporate, union and nonprofit electoral activity crafted by Congress.

B. The FEC and Intervenors also argue that the district court erred in not considering certain evidence with respect to the timing of the advertisements: (i) that the Senate did not have any judicial cloture votes after WRTL began runnings its ads; (ii) that the Senate was not in session when the ads were run, and (iii) that WRTL did not run any further filibuster ads in 2004 or 2005. FEC Brief at 45-47; Intervenors' Brief at 27-28. Had this evidence been considered, the government argues, it would have demonstrated that the advertising campaign was intended "to coincide with the electoral schedule, and that the pre-election timing was not

simply fortuitous." *Id.* at 46. The district court did, however, take into account the fact that the ads "describe[d] an issue that had been, and was likely to be an ongoing issue of legislative concern in the Senate," J.S.App. 23a, and its refusal to delve further into this issue was justified by a number of considerations.

The timing of ads during the periods prior to primary and general elections cannot automatically disqualify them from constitutional protection, since by definition BCRA § 203 applies only to broadcast communications that are run in the 30/60 day periods prior to elections. While it may be marginally relevant whether ads were run early or late in the statutory periods, this fact too is not always dispositive in demonstrating an electioneering purpose. The specific timing of an advertising campaign may reflect the legislative calendar as much as the electoral calendar,[14] since numerous legislative issues come to a head in Congress during the periods prior to primary and general elections.[15] The fact that

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[14] In the district court, the FEC offered as proposed findings of fact its contentions that "scheduling of the judicial filibuster votes that occurred before the recess was largely for the particular purpose of mobilizing voters in the election," and that "judicial filibuster votes were scheduled in order to mobilize conservative voters in the fall election." Defendant Federal Election Commission's Proposed Findings of Fact, Nos. 75, 77, at J.A. 31. One can only wonder at the breadth of discovery and testimony which would be necessary before a court could make reliable findings on questions of fact as complicated as these.

[15] In its Brief when this case was previously before the Court, *Amicus* showed that the 60-day period prior to general elections is frequently a period of intense legislative activity. For example, between September 4 and Election Day 2004, over 100 roll call votes were taken in the U.S. House of Representatives and nearly 50 roll call votes occurred in the U.S. Senate. These votes involved numerous significant issues, including welfare reform, a constitutional amendment on marriage, tort reform, and Department of Defense and other agency appropriations. *See* Brief of Alliance For Justice As *Amicus Curiae* In Support of Appellant in No. 04-1581 (O.T. 2005), 13.

Congress was not in session when the WRTL ads were run could merely suggest an intent to reach the public during the very period when Senators were likely to be in their home states; or, it may reflect the fact that the organization was unable to raise sufficient funds to support its advertisements until the pre-election period.

An organization also may have numerous non-political reasons for failing to disseminate similar ads after an election, including the fact that it may have exhausted its available funds on the first round of ads or that other more pressing issues may have arisen. Nor can it be argued that in order to be allowed to disseminate legislative and policy communications in pre-election periods, an advocacy organization must demonstrate that it will run similar advertisements when the issue arises in the future. In a typical case,[16] an organization will have made no decision regarding future advertising at the time that the issue arises in an as-applied case, and it would be speculative at best to engage in an inquiry into its future plans.

The point is not that the timing evidence on which appellants rely can never be indicative of an electioneering purpose or effect; the point is that such evidence may reasonably be disputed by an organization in a particular case, as it was here. Given the debatable and disputable nature of any inferences which might have been drawn from the timing of WRTL's advertisements, the district court would have had to conduct a full-blown evidentiary inquiry[17] in order to make

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[16] Because of the prior appeal to this Court, evidence was uniquely available regarding WRTL's post-election activity concerning the judicial filibuster issue.

[17] This inquiry may not be limited to the organization's testimony; it may also be necessary to take evidence from the outside consultants who designed and produced the advertisements. In this case, for example, the FEC took the deposition of the consultant at WRTL's advertising agency who coordinated the organization's ads, and the agency obtained production of the consultant's handwritten working papers and other documents pertaining to his work. *See* Defendant Federal Election Commission's

reliable findings as to the actual reasons for the timing of the WRTL ads. The FEC agrees that such an inquiry is not generally appropriate in an as-applied constitutional challenge to BCRA § 203,[18] and it was not necessary or appropriate here.

C. The FEC finally argues that the district court erred in failing to consider WRTL's "pattern of electoral advocacy during the 2004 campaign,"[19] FEC Brief at 48, including evidence concerning the organization's prior lobbying activities and the partisan political activities of its PAC. The FEC's reliance on this "contextual" evidence is impracticable and inappropriate for several distinct reasons.

First, opening as-applied constitutional challenges to a full-scale inquiry into an organization's previous or contemporaneous lobbying and political activities will defeat the goal of limiting such inquiries which the FEC itself acknowl-

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Proposed Findings of Fact, Nos. 54, 61, at J.A. 26, 28. For larger organizations with more money to spend, of course, there could be more than one consultant whose testimony might be deemed relevant.

[18] Intervenors do not appear to agree with the FEC on this point, arguing instead that the factual inquiry presented in these cases is no different than the issues presented in any preliminary injunction hearing decided on an expedited basis. Intervenors' Brief at 38. In this very case, however, although this Court entered its remand Order in *WRTL I* on February 27, 2006, it was not until September 1, 2006, more than five months later, that the parties submitted their filings in support of the cross-motions for summary judgment. *See* District Court Docket Entries, J.A. 9. This long delay presumably was due to the broad scope of discovery engaged in by the FEC and Intervenors.

[19] Taking this reasoning to even more specious heights, Intervenors rely on the actions and comments of the Wisconsin Republican Party, Republican candidates in Wisconsin and even Vice-President Chaney to show the electioneering purpose of WRTL's advertisements. Intervenors' Brief at 25-27. The fact that the filibuster issue was raised by Senator Feingold's opponents in a partisan manner does not show that WRTL's own nonpartisan communications had the purpose or effect of influencing the election, rather than influencing the Senator's future position on a continuing issue of great public importance.

edges is key to protecting First Amendment rights. This type of sweeping inquiry by a government agency into the methods and tactics of advocacy organizations could have a devastating impact on the associational and speech rights of the organizations and their members. *See, e.g., Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963); *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (Frankfurter, J. concurring). And, the fact that an advocacy organization has opposed an incumbent Senator's legislative actions, even strenuously and continuously, should not be used to demonstrate that its pre-election advertisements have an election-influencing purpose, for advocacy organizations would then either have to avoid mentioning the names of incumbent representatives as part of their lobbying communications or take the risk that negative inferences might later be drawn from their work.

Second, the FEC's reliance on the lawful political activities of the WRTL PAC, is at odds with this Court's conclusion that the activities of a separate segregated fund should not be attributed to the parent organization for legal purposes, as long as there is strict segregation of the fund's monies from the organization's general treasury funds. *See Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 414-416 (1972). The scheme outlined by the Court in *Pipefitters* was carried forward for both unions and corporations, including nonprofit corporations such as WRTL, in FECA. *See* § 316(b)(2)(C). And, in *McConnell* this Court specifically relied upon the ability of advocacy organizations "to organize and administer segregated funds, or PACs," for the purpose of carrying out electioneering communications in upholding the facial constitutionality of the very provision in issue here. 540 U.S. at 204. The FEC's and Intervenors' reliance on the political endorsements and other partisan communications of WRTL's separate PAC thus is contrary to Congress' intention that a PAC's activities should not be attributed to its parent corporation or union and would, if adopted by this Court,

upset FECA and BCRA's carefully constructed balance in the area of corporate and union political activity.

Since this Court's decision in *Regan v. Taxation With Representation of Washington, supra,* modern advocacy organizations have become adept at operating through related multiple organizations each subject to its own legal requirements and limitations. Organizations may carry out partisan political activities through their PAC to the full extent permitted under the law while simultaneously conducting legitimate lobbying activities through their IRC § 501(c)(4) or § 501(c)(3) arms. There is no reason why the political purposes of one set of activities must necessarily taint the nonpolitical activities of a related organization. Moreover, the FEC's and Intervenors' position would force groups to choose between conducting lawful partisan political activities through their PACs or engaging in non-political lobbying communications during the periods when both types of activities are most crucial and most effective. This is contrary to the expressed intention of the sponsors and supporters of BCRA § 203, who made clear that the restriction on corporate electioneering communications would not interfere with lobbying and public policy advocacy. *See, e.g.*, 147 Cong. Rec. S2846 (daily ed. Mar.26, 2001) (Sen. Wellstone); *id.* at S2813 (daily ed. Mar. 23, 2001) (Sen. Jeffords) *id.* at S2458 (daily ed. Mar. 19, 2001)(Sen. Snowe).

V. The Availability of the PAC and *MCFL* Options Is Not Relevant In This As-Applied Challenge.

The Intervenor-defendants argue that in deciding this as-applied challenge the district court should have considered the availability to WRTL of two options other than using its general treasury funds for disseminating its broadcast communications: paying for the ads through its PAC or qualifying as an *MCFL* organization by refusing to take business contributions. Intervenors' Brief at 13, 15, 29-31. The gov-

ernment does not appear to rely on this argument, which should be rejected for a number of reasons.[20]

First, the *MCFL* exception is not a viable option for many advocacy organizations because of the restricted manner in which the FEC has implemented the exception. Because the FEC regulation denies qualified nonprofit corporation ("QNC") status to an advocacy organization if it receives *any* contributions from business or labor, 11 C.F.R. § 114.10(c)(4)(ii), advocacy organizations must refuse to accept even a *de minimis* amount, or a small percentage, of their financial support from business or labor, even though there is no real threat that these organizations would act as "conduits" for their donors' interests.[21] Furthermore, as dis-

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[20] Intervenors' alternative argument, Intervenors' Brief at 31, that advocacy organizations can simply avoid BCRA § 203 by not mentioning the names of federal candidates in their pre-election broadcast communications suffers from the same weaknesses. First, this view would effectively nullify the right to bring as-applied challenges allowed in *WRTL I* because it would always be the case that a speaker could change its message to fall outside of the statute. Second, Intervenors' argument ignores the fact that referring to specific incumbent legislators by name is regarded by most advocacy organizations as the most effective means of conducting grassroots lobbying. *See McConnell,* 251 F. Supp. 2d 156, 794 (Leon, J.) (citing testimony of National Association of Manufacturers and AFL-CIO). Third, if courts must determine whether mentioning a candidate by name adds to the efficacy of particular advertisements, hearings in as-applied challenges will turn into a battle of competing experts, with each side relying on the opinions of its own political consultants to show how best to influence the public with a particular lobbying message. In this case, for example, the FEC proffered evidence that *other* organizations concerned with the judicial filibuster and other issues ran ads outside of BCRA's 60-day period which did not mention the names of specific candidates. FEC Proposed Findings, Nos. 140-146, at J.A. 45-56. The depth of inquiry which would be necessary to explore the inferences which the FEC sought to draw from these facts is simply mind-boggling.

[21] *See FEC v. National Rifle Association,* 254 F. 3d 173, 191-93 (D.C.Cir.2001); *FEC v. Survival Education Fund, Inc.,* 65 F.3d 285, 292-94 (2d Cir. 1995). *See also North Carolina Right To Life, Inc. v. Bartlett,*

cussed *supra* at pp. 4-5, the FEC regulation contains other important restrictions on eligibility for the *MCFL/McConnell* exception, including excluding IRC § 501(c)(3) organizations and prohibiting organizations from providing the kinds of ancillary benefits, such as credit cards or insurance, that have become a common and important source of revenue in the nonprofit sector.

Second, as a matter of federal tax law, the PAC option is not available to an advocacy organization whose broadcast communications do not have an electoral purpose. In order to qualify for tax exemption under IRC § 527, the Tax Code provision applicable to political organizations such as PACs, an advocacy organization must be organized and operated for "the purpose of directly or indirectly accepting contributions or making expenditures for an exempt function," IRC § 527(e)(1), which is defined as the "function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to" any federal office, office in a political organization, or the election of Presidential electors. IRC § 527(e)(2). Any PAC which seeks to maintain its exemption under these provisions must therefore demonstrate that its lobbying and policy activities have an electoral purpose.[22] Thus, any organization that conducts grassroots lobbying through a PAC would risk the imposition of significant taxes which would not apply if it uses its general treasury funds to make the same expenditures.

Third, if courts are required, as Intervenors suggest, to determine whether the *MCFL* or PAC options are viable alternatives in a particular case, as-applied challenges will become

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168 F.3d 705, 714 (4th Cir. 1999); *Day v. Holahan*, 34 F.3d 1356, 1363-64 (8th Cir. 1994).

[22] *See* Treas. Reg. § 1.527-2(a)(3) ("nonpartisan educational workshops" which are not intended to influence the selection and election process are not exempt function activities); P.L.R. 9725036 (June 23, 1997) (grassroots lobbying activities are for an exempt function under IRC § 527 where they "have a political purpose.")

expansive factfinding exercises into issues well beyond the purpose or effect of the advertisements in question. Intervenors, for example, rely on the fact that WRTL "offered no specific evidence to support" its claim that "it was unable to raise sufficient funds for its PAC in 2004 to finance the $100,000 it expected to spend on the ads." Intervenors' Brief at 29. In the district court, the FEC similarly offered as proposed findings of fact its assertions that "[r]ather than being unable to raise money for its federal PAC in 2004, it appears that WRTL ceased raising money for that account and shifted its fundraising efforts toward its general treasury" and that "WRTL made no special effort in 2004 to raise additional PAC funds or recruit new members." FEC Proposed Findings, Nos. 122, 130, at J.A. 41, 43.[23] Putting aside the burden such inquiries would place on the parties and the courts, federal judges do not have the expertise to make such determinations. On the other hand, unless facts such as these are to be considered, Intervenors' argument would virtually eliminate the as-applied challenge approved in *WRTL I* as a viable remedy, for every 501(c)4 can, at least in theory, establish a PAC or switch to *MCFL* status to conducts its activities.

Finally, the Court's reliance on the PAC option in *McConnell* provides no support for a similar approach in as-applied cases. In a facial challenge such as *McConnell*, the ability of corporations to establish PACs to conduct electioneering communications had bearing on the Court's determination of BCRA § 203's overbreadth, because the availability of PACs could mean that fewer businesses and nonprofit corporations would seek to use their general treasury funds for such expenditures. But the PAC option has no logical relevance to the as-applied constitutional question of whether specific

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[23] The agency attempted to support this ultimate conclusion by comparing the funds raised by WRTL in 2004 with the funds it had raised in earlier years, *id.* No. 123, and by further comparing WRTL's fundraising in 2004 with national trends. *Id.* Nos. 125 & 126, at J.A. 42.

issue advertisements are "sham" or "genuine"; whether grass-roots lobbying communications are paid for with PAC or treasury funds, their purpose and effect remain the same.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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